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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE JORGE GUZMAN,

Defendant and Appellant.

B205485

(Los Angeles County
Super. Ct. No. PA057819)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Schuit and Ronald S. Coen, Judges. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jose Jorge Guzman guilty of possession of methamphetamine for sale and transportation of methamphetamine. He appeals, arguing that the trial court erred in denying his motion to suppress evidence, that a jury instruction was defective, and that his sentence is constitutionally invalid. We affirm.

BACKGROUND

On February 14, 2007, an information charged Guzman with possession for sale of methamphetamine in violation of Health and Safety Code section 11378 (count 1), and transportation of methamphetamine, in violation of Health and Safety Code section 11379, subdivision (a) (count 2). The information also alleged that Guzman had a prior conviction for possession or purchase for sale of a controlled substance under Health and Safety Code section 11351, within the meaning of Health and Safety Code section 11370.2, subdivision (a).

Guzman moved to suppress evidence under Penal Code section 1538.5, and the court denied the motion after a hearing. A jury convicted Guzman on both counts on December 6, 2007. Guzman waived his right to a jury trial on the enhancement and admitted the prior conviction. The trial court sentenced Guzman to seven years (the upper term of four years on count 2, plus a three-year consecutive term for the enhancement, and the upper term sentence of three years on count 1, which the trial judge stayed pursuant to Penal Code section 654). The court also ordered Guzman to pay fines and fees.

The evidence at trial established that on November 4, 2006, at 8:00 p.m., Los Angeles Police Detective Chris McKinney and his partner Los Angeles Police Officer Rodolfo Rodriguez were in an unmarked police vehicle patrolling Magee Avenue in Pacoima, an area known for narcotics activity. Both officers had experience, training, and education regarding narcotic trafficking. The officers saw a black two-door 2002 Mustang drive by slowly and pull into the driveway of a residence; the people standing in the front yard did not appear to recognize the car. The driver's side window of the

Mustang was heavily tinted. Detective McKinney could not see the driver's face and believed the vehicle was in violation of Vehicle Code section 26708.

Detective McKinney approached the driver's side window and Officer Rodriguez approached the passenger side, the window of which was also tinted. Detective McKinney's police badge was displayed on his left pocket. He raised his hand and said in English, "Police officer, can I talk to you." He could not see through the tinted window, but saw the driver when he looked through the untinted front windshield. When the driver, who was Guzman, opened the door, Detective McKinney identified himself again in Spanish. He illuminated his police badge with his flashlight, and asked Guzman in English and in Spanish if he had a driver's license. Guzman said no. Driving without a license was an arrestable offense in violation of Vehicle Code section 12500.

Guzman moved his right hand toward his right ankle. Detective McKinney knew from experience that weapons are commonly concealed in the ankle area and told Guzman to stop moving, in English and in Spanish. He asked Guzman to get out of the car and Guzman complied.

Detective McKinney secured Guzman's hands behind his back and patted him down for weapons. In Guzman's right sock, he found four individually wrapped bindles of a crystal-like substance that appeared to be methamphetamine. He arrested Guzman and handcuffed him.

Detective McKinney asked Officer Rodriguez to search Guzman again. Rodriguez did a patdown search and felt currency in Guzman's pants pocket. At the police station, Rodriguez removed the currency and counted a total of \$717. The money was in one \$100 bill, two \$50 bills, nineteen \$20 bills, four \$10 bills, eleven \$5 bills, and forty-two \$1 bills. Guzman told Officer Rodriguez that he worked in construction and was unemployed. When tested, the substance in the bindles was 3.20 grams of methamphetamine.

Detective McKinney testified that in his opinion, Guzman possessed the methamphetamine to sell it, because the amount was larger than a user would use, four packages indicated the possessor was a seller, and Guzman's currency was in

denominations typical of a seller. There was no “user” paraphernalia in the car, which indicated a professional and experienced drug seller. Guzman did not appear to be under the influence of methamphetamine.

A defense expert testified that in his opinion, the four bindles were possessed for use, not sale, and that drug users as well as dealers hid drugs in their socks. He also testified that drug dealers usually separate large from small bills on their person, and that the denominations Guzman possessed were not indicative of a dealer.

Guzman testified that he was a day laborer in construction, and the \$717 in his pocket was his cash payment for working on a cement wall. He did not have a checking account or an ATM card. Guzman had bought the drugs in his sock on the street that morning for \$100 and had snorted some of it at home. He was driving his girlfriend’s car to a friend’s house, got lost, and pulled into the driveway to call his friend on his cell phone. Guzman acknowledged that he told the officers his name was Jorge Ramirez. He admitted that he had a prior arrest for possession with intent to sell cocaine and was addicted to crystal methamphetamine, but claimed he had not sold any drugs since his last arrest 10 years ago.

The jury convicted Guzman on both counts.

ANALYSIS

I. The trial court properly denied the motion to suppress.

At the hearing on the motion to suppress, Detective McKinney testified that when he saw the Mustang, he noticed “[t]he driver side and passenger side front windows were tinted to the point where I could only see a shape inside the vehicle, couldn’t see a person,” which he believed was a violation of Vehicle Code section 26708, subdivision (a)(1). After the Mustang pulled into the driveway, Detective McKinney waited about three minutes before approaching the car, hesitating in part “due to the darkness of the tint.” Detective McKinney then identified himself, asked Guzman to open the car door, and asked for his driver’s license. He detained Guzman when he answered no. Detective McKinney described Guzman’s motion toward his right ankle, his exit from the vehicle,

the patdown search that uncovered the methamphetamine, and Officer Rodriguez's recovery of the cash.

The court concluded that Detective McKinney had probable cause to suspect that the Mustang's tinted windows violated Vehicle Code section 26708, allowing him to make a traffic stop. The subsequent arrest for not having a driver's license was lawful, and the search was lawful before or after the actual arrest. The court denied the motion to suppress.

Under the Fourth Amendment and federal constitutional law, police may make a stop of a vehicle "to investigate a 'reasonable suspicion' that its occupants have been, are, or are about to be engaged in criminal activity." (*People v. Butler* (1988) 202 Cal.App.3d 602, 606, quoting *United States v. Hensley* (1985) 469 U.S. 221, 227 [105 S.Ct. 675].) On appeal, Guzman argues that the traffic stop was illegal because Detective McKinney did not have a reasonable suspicion that the Mustang's tinted windows violated the Vehicle Code. We independently review the trial court's application of the law to the undisputed facts in deciding the motion to suppress. (*People v. Thompson* (2006) 38 Cal.4th 811, 818.)

Vehicle Code section 26708, subdivision (a)(2) makes it unlawful to tint a vehicle's window in a way that "obstructs or reduces the driver's clear view through the windshield or side windows," although the statute allows window tinting that complies with federal car safety regulations. Merely "seeing someone lawfully driving with tinted glass" is not sufficient to raise a reasonable suspicion of illegality to justify a traffic stop. (*People v. Butler, supra*, 202 Cal.App.3d at p. 607.) There must be "additional articulable facts suggesting that the tinted glass is illegal." (*Ibid.*) Such "additional facts" would include that the officer could only see the outline of the driver through the window, and a traffic stop would be justified if an officer testified to "other than merely the bare statement [that the vehicle] had tinted windows." (*People v. Niebauer* (1989) 214 Cal.App.3d 1278, 1283, 1292, fn. 10; *People v. Hanes* (1997) 60 Cal.App.4th Supp. 6, 10 [there was reasonable suspicion when it was nighttime, illegal tinting was greater

safety concern, and tinting was so dark as to prevent officer from seeing occupants of front seats].)

Detective McKinney testified that he could only see a shape inside the Mustang through the tinted windows, not a person, and that he hesitated to approach the car because the tint was so dark. These additional facts support a reasonable suspicion that Guzman was driving with illegally tinted windows and justify the investigative stop of the Mustang. The trial court correctly denied the motion to suppress.

II. CALCRIM No. 300 does not violate the requirement that the prosecution prove its case beyond a reasonable doubt.

The trial court instructed the jury using CALCRIM No. 300, which states: “Neither side is required to call *all* witnesses who may have information about the case or to produce *all* physical evidence that might be relevant.” (Italics added.) Guzman argues that this instruction, while a correct statement of the law, might have left the jury with the belief that the defense is required to produce “some” evidence, thus violating his constitutional right to have the state prove his guilt beyond a reasonable doubt.¹

Several courts of appeal have rejected this exact argument, following *People v. Simms* (1970) 10 Cal.App.3d 299. In *Simms*, the defendant argued that a similar instruction could have led the jury to infer that he shared the burden of proof with the government. The court rejected the argument, because the instruction correctly stated the law, the jury was “thoroughly” instructed on the burden of proof, and there was no reasonable likelihood that the jury misconstrued the challenged instruction. (*Id.* at p. 313.) CALCRIM No. 300, the instruction given here, has been upheld as constitutional in *People v. Anderson* (2007) 152 Cal.App.4th 919, 938, *People v. Ibarra*

¹ Guzman did not object to CALCRIM No. 300 at trial, but “a defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant’s ‘substantial rights.’” (*People v. Felix* (2008) 160 Cal.App.4th 849, 857.) Because Guzman contends that the instruction alters the burden of proof and therefore affects his substantial rights, we address his contention on the merits.

(2007) 156 Cal.App.4th 1174, 1190, and *People v. Felix, supra*, 160 Cal.App.4th at page 858. In each case, as here, the jury was also instructed that the defendant was presumed innocent, and that this presumption required that the prosecution prove the defendant guilty beyond a reasonable doubt.

We agree with those decisions and conclude that the giving of CALCRIM No. 300 did not violate Guzman's constitutional rights. Guzman's jury was instructed pursuant to CALCRIM No. 220, which states: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt." Applying "the usual presumption that jurors are able to correlate, follow, and understand the court's instructions" (*People v. Ibarra, supra*, 156 Cal.App.4th at p. 1190), we see no reasonable likelihood that the jury misunderstood CALCRIM No. 300 as requiring Guzman to present evidence or as diluting the requirement that the prosecution prove its case beyond a reasonable doubt. The jury was properly instructed pursuant to CALCRIM No. 300.

III. The trial court properly sentenced Guzman to an upper term sentence.

At the sentencing hearing on December 13, 2007, the trial court sentenced Guzman to the upper term of four years on count 2 (transportation of methamphetamine), plus a three-year enhancement for Guzman's prior narcotics conviction, for a total sentence of seven years. The court stayed his three-year upper term sentence on count 1 (possession of methamphetamine for sale). The court stated: "I will select count 2 as the base term. [¶] In determining the proper term of imprisonment, I refer to Penal Code section 1170, subdivision (b), *especially as amended, which the Supreme Court has hinted is retroactive*. In any event, I do find that he was on probation at the time of the offense as a factor in aggravation. I do find nothing in mitigation. This case warrants the high term of four years. [¶] As to count 2, for violation of Health and Safety Code section 11379, subdivision (a), probation is denied for the reasons I have stated. Defendant is sentenced to state prison for the high term of four years. As to count 1, violation of Health and Safety Code section 11378, defendant is sentenced to state prison

for the high term of three years for the reasons I have stated. That is stayed pursuant to the dictates of Penal Code section 654, said stay to become permanent [upon] the successful completion of the sentence in count 2. [¶] Pursuant to the dictates of Health and Safety Code section 11370.2, subdivision (a), defendant is levied an additional and consecutive three years in state prison, for an unstayed term of seven years in state prison.” (Italics added.)

Guzman argues that his upper term sentence violates *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856], in which the United States Supreme Court held that former Penal Code section 1170, subdivision (b), violated defendants’ Sixth and Fourteenth Amendment rights to trial by jury by giving “to the trial judge, not the jury, authority to find the facts that expose a defendant to an elevated ‘upper term’ sentence” such as Guzman’s. The right to trial by jury “proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Id.* at pp. 274-275.) Because California’s determinate sentencing law at the time characterized the middle term sentence as the statutory maximum, the imposition of the upper term exceeded the statutory maximum and required a jury finding. (*Ibid.*)

After *Cunningham* and before Guzman’s sentencing, the Legislature amended section 1170, subdivision (b), and the California Supreme Court judicially adopted the amendments for retroactive application. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846, 857.) The amendments provided that a court must exercise its discretion in choosing a lower, middle, or upper term, but no additional factual finding is necessary to impose an upper or lower term. “This reformation . . . would cure the constitutional defect in the statute, because . . . ‘when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.’” (*Id.* at p. 844.) The California Supreme Court concluded that “the federal Constitution does not prohibit the application of the revised sentencing process explained above to defendants whose crimes were committed prior to the date of our decision in the present case.” (*Id.* at p. 857.)

Guzman does not dispute that *Sandoval* allowed the trial judge to apply the revised section 1170 to him, although he committed his crimes before *Sandoval* was decided. Instead, he contends that the California Supreme Court wrongly decided *Sandoval* and *People v. Black* (2007) 41 Cal.4th 799, 812 (*Black II*), which held that under the unrevised sentencing scheme, a trial judge could base an upper term sentence on the defendant's prior convictions without violating the right to a jury trial. The trial court in this case based the upper term sentence on Guzman's recidivism ("he was on probation at the time of the offense") and, therefore, even under the prior sentencing system, Guzman was eligible for an upper term sentence without further fact-finding by a jury. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992 [no error in trial judge sentencing defendant to upper term based on prior convictions under either revised section 1170 or former statute, citing *Black II*].)

We are bound by the California Supreme Court decisions in *Sandoval* and *Black II* and decline Guzman's invitation to disagree with the existing law. Guzman's upper term sentence was constitutional.

DISPOSITION

The judgment and sentence of the trial court are affirmed.

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WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.